THE CO-OPERATIVE CENTRAL BANK LTD

v.

Y & W DEVELOPMENT SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[APPEAL NO: W02-806-95]
1 JULY 1997

LAND LAW: *Charge - Third-party charge - Whether akin to a guarantee - Whether law on guarantees applicable to a third-party charge - Registered charge - Whether a contract*

The respondent had earlier created a third-party charge ('the said charge') over a piece of land in favour of the appellant. The borrower, however, was not the respondent but one Ismail Omar. As it transpired, the borrower defaulted in his repayment and the appellant commenced proceedings for an order for sale. The learned judge, however, decided against the appellant on account that the respondent had shown cause to the contrary within the meaning of s. 256 of the National Land Code 1965 ('the Code'). It was held by the learned judge that the said charge was not supported by consideration; that the loan amount had been disbursed well before the creation of the said charge; that, applying the principles governing relationships between creditor and surety, the consideration was past; and that just as a guarantee is void where consideration is past, so too is a charge.

Held:
Per Gopal Sri Ram JCA

[1] Whilst it is convenient to refer to a third party charge as being akin to a guarantee, it is **wrong** to conclude that the principles of law governing guarantees apply with equal force to such a charge.

[1a] Section 340 of the Code confers indefeasible title to the person or body in whose name any charge is for the time being registered, and such title shall be defeasible only as provided under s. 340(2).

[1b] A registered charge is not a contract; it is a statutory instrument – a dealing – which the Code authorises. The enforcement of such a charge is an assertion of a statutory right. It is not an action upon the covenant.

[Appeal allowed; judgment of learned judge reversed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Gadaian - Gadaian pihak ketiga - Samada sama dengan satu gerenti - Samada undang-undang mengenai gerenti terpakai kepada gadaian pihak ketiga - Gadaian berdaftar - Samada merupakan satu kontrak*

Responden telah pada awalnya mewujudkan gadaian pihak ketiga ('gadaian tersebut') keatas sebidang tanah atas nama perayu. Peminjam, namun begitu, bukannya responden tetapi seorang yang bernama Ismail Omar. Sepertimana yang telah berlaku, peminjam telah mengingkari dalam pembayaran baliknya dan perayu telah memulakan prosiding untuk satu perintah jualan. Hakim yang bijaksana, walaubagaimanapun, telah memutuskan terhadap perayu atas kiraan bahawa responden telah menunjukkan kausa yang bertentangan dalam maksud s. 256 Kanun Tanah Negara 1965 ('kanun'). Adalah diputuskan oleh hakim yang bijaksana bahawa gadaian tersebut telah tidak disokong oleh balasan; bahawa amaun pinjaman itu telah dibayar keluar jauh sebelum wujudnya gadaian tersebut; bahawa, dalam memakai prinsip-prinsip yang menguasai perhubungan antara pemiutang dan penjamin, balasan telah berlalu; dan bahawa sepertimana sesuatu gerenti itu menjadi batal di mana balasan telah berlaku, begitu juga keadaannya dengan sesuatu gadaian.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Sementara ianya mudah untuk merujuk kepada satu gadaian pihak yang ketiga sebagai sama dengan sesuatu gerenti, ianya adalah salah untuk memutuskan bahawa prinsip-prinsip undang-undang yang menguasai gerenti-gerenti terpakai dengan kuasa yang sama terhadap gadaian yang sedemikian.

[1a] Seksyen 340 kanun menganugerahkan hakmilik tak boleh sangkal kepada orang atau pertubuhan di atas nama siapa mana-mana gadaian adalah ketika itu didaftarkan, dan hakmilik yang sedemikian akan boleh disangkal hanya sepertimana yang diperuntukkan di bawah s. 340(2).

[1b] Sesuatu gadaian berdaftar bukannya sesuatu kontrak; ianya adalah suratcara statutori – satu urusan – yang mana kanun itu membenarkan. Penguatkuasaan gadaian yang sedemikian merupakan satu penegasan akan sesuatu hak statutori. Ianya bukannya merupakan satu tindakan ke atas waad.

[Rayuan dibenarkan; penghakiman hakim yang bijaksana diakas.]

Cases referred to:
NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers [1986] 1 MLJ 44 ***(foll)***
Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8 ***(cit)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(cit)***

Legislation referred to:
National Land Code 1965, s. 256

[Appeal from High Court Malaya, Kuala Lumpur; Originating Summons No: S1-24-666-92]

JUDGMENT

Gopal Sri Ram JCA:

The appellant is the registered chargee of a piece of land. The respondent is the chargor. But it is not the borrower. It created what the profession calls a third party charge. The borrower was one Ismail bin Omar. He made default in repayment. The appellant then took advantage of the provisions of the National Land Code 1965 ('the Code') and commenced proceedings to obtain an order for sale of the land in question. But they did not succeed. That is because the judge who heard the application came to the conclusion that the respondent chargor had shown cause to the contrary within the meaning of that expression in s. 256 of the Code.

The principal ground upon which the learned judge held in favour of the chargor is that the charge was unsupported by consideration. He found on the evidence that the loan amount was disbursed well before the creation of the charge. Applying principles governing relationships between creditor and surety, he held the consideration to be past. He thought that just like a guarantee is void where consideration is past, so too a charge.

Before us counsel for the appellant, Mr. Achan has argued that the learned judge is wrong for two reasons. First, it is submitted that the annexure to the charge in cl. 1 provides sufficient consideration. That clause when paraphrased says that the respondent is to pay the appellant all sums owing as at the date of the charge. To emphasise the point made, the actual words used by the clause are:

> The chargor will on demand pay to the Bank all monies which are now or shall from time to time or at any time hereafter be due and owing by the abovenamed Ismail bin Omar ...

The second reason advanced in support of the appeal is that the learned judge was wrong in treating the contract in the annexure as equivalent to the registered charge. Counsel for the appellant argues that even if the judge was

right in holding that the contract was void, the charge survives. In support of this submission counsel cites the decision of the Federal Court in *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd* [1986] 1 MLJ 44.

Mr. K. Jeyaraj counsel for the respondent has argued that the learned judge was correct in his conclusion. He has submitted that a third party charge is just like a guarantee. It must be supported by consideration. Since the law regards past consideration as being incapable of supporting a promise, a charge created after the disbursement of the loan it secures is void, just as a guarantee is void.

In my judgment counsel for the appellant is correct in his submissions. Whilst it is convenient to refer to a third party charge as being akin to a guarantee (indeed, I have done so myself) it is wrong to conclude that the principles of law that govern guarantees apply with equal force to such charges. The correct position is that stated by Hashim Yeop Sani FJ (as he then was) in *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd. (supra)*. In the simplicity of language characteristic of that eminent judge he said:

> Section 340 of the National Land Code confers indefeasible title to the person or body in whose name any charge is for the time being registered and such title shall be defeasible only as provided under sub-s. (2) of that section. See also *Tai Lee Finance Co. Sdn Bhd v. Official Assignee & Ors.*
>
> It would seem to us that the appellants chose to rely not on the charge but on the annexure to the charge which, it is true, provides as to the manner and conditions for the disbursement of the loan. In our view, however, cl. 3.04 of the annexure merely imposes a duty on the bank to make the disbursement of the loan after the execution and presentation of the charge. But this does not prevent the respondent bank from making disbursement before the execution of the charge as done in this case with the understanding the money was urgently required for the purpose of purchasing the same land. It is to be noted also that the rate of interest payable was the same. The conditions precedent for disbursement under Article V of the annexure to the charge would be relevant only where disbursement of the loan had not been prior to the execution of the Charge.

Not only do I agree with what has been said by his Lordship on that occasion, but I also think it is common sense. A registered charge is not a contract. It is a statutory instrument; a dealing; which the Code authorises. Enforcement of the charge is the assertion of a statutory right. It is not an action upon the covenant. See, *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8.

In the present case, if the appellant had sued for breach of the terms in the annexure, that is to say, upon the covenant, then, it may have been successfully argued that the contract was unsupported by consideration. I use the word "may" advisedly because I am in agreement with appellant's counsel that the annexure itself was supported by consideration, which in my judgment is sufficient and not past.

I am accordingly unable to agree with the submission of Mr. Jeyaraj in opposition to the appeal. In my judgment, the learned judge erred upon a fundamental point, which forms the fulcrum of the Code. The charge in this case is perfectly valid. The evidence disclose no cause to the contrary within the principles which the Federal Court laid down in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36.

For the reasons given, this appeal must be allowed. I would reverse the judgment of the learned judge and make an order in terms of prayers (1) and (2) of the appellant's originating summons. All other prayers are remitted to the judge for disposal. Since counsel on both sides are agreed to this court fixing the costs of this appeal, I would award costs of RM1,000 to the appellant. The deposit lodged in court shall be refunded to the appellant.

Abdul Malek Ahmad JCA:

I agree with the reasons given by my brother Gopal Sri Ram JCA. I too would allow this appeal with costs of RM1,000 to the appellant.

Ahmad Fairuz JCA:

I agree with the reasons given by my brother Gopal Sri Ram JCA, and with the orders he proposes to make in this appeal. In particular, I agree with his application of the decision in *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd. (supra)* and his interpretation of cl. 1 of the annexure to the charge in this case.

Reported by Gan Peng Chiang